No. 14366.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RAYMOND J. VEELIK,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

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PAUL P. O'BRIEN
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ROBERT W. WALKER,
J. H. CUMMINS,
448 Sante Fe Building,
121 East Sixth Street,
Los Angeles 14, California,
Attorneys for Defendant and Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEE'S BRIEF.

Statement of the Case.

Appellant, Raymond J. Veelik, instituted suit under the Federal Employers' Liability Act, Title 45, U. S. C. A., Section 51, *et seq.* Appellee admitted liability for such injuries and damages as were sustained by appellant and appellant obtained a jury verdict upon which judgment was entered in the sum of $2,000.00. Thereafter, appellant moved for a new trial upon the alleged ground of insufficiency of evidence to justify the verdict, decision and judgment. This motion the trial court denied on March 1, 1954. Thereupon, appellant, plaintiff, below, brought this appeal.

ARGUMENT.

Appellant Has Not Sustained the Burden of Showing Error.

On page 2, first full paragraph, of appellant's brief, appellant states as follows: "I will state in narrative form the evidence which was given and will disregard all conflicting evidence and all evidence which contradicts the evidence in favor of plaintiff."

Appellant erroneously assumes that only evidence favorable to plaintiff and reasonable inferences therefrom are to be considered on this appeal, just as if this were a case in which a verdict for plaintiff had been set aside summarily by the trial court and judgment entered for the defendant, in which case, of course, the legal question would be whether or not plaintiff's evidence was sufficient to sustain a verdict in his favor. (*Maty v. Grasselli Chemical Co.* (C. C. A., N. J., 1938), 98 F. 2d 877.)

In order to obtain a reversal for alleged inadequacy of the damages, appellant must show error which cannot be presumed and will not be inferred. (*Fidelity & Deposit Co. of Maryland v. Lindholm* (C. C. A. 9th), 66 F. 2d 56, 89 A. L. R. 279; *Hardt v. Kirkpatrick* (C. C. A. 9th), 91 F. 2d 875, rev. D. C., *In re Kirkpatrick,* 17 Fed. Supp 56, cert. den., *Kirkpatrick v. Hardt,* 303 U. S. 626, 58 S. Ct. 762, 82 L. Ed. 1088.)

A judgment is presumed correct on appeal until appellant shows the contrary. (*Manhattan Life Ins. Co. v. Wright* (C. C. A. 8th), 126 Fed. 82, 61 C. C. A. 138.)

The evidence must be considered in the light most favorable to the prevailing party. (*Fidelity & Casualty Co. of New York v. Griner* (C. C. A. 9th), 44 F. 2d 706.) In this case, there was a disagreement between medical ex-

perts of plaintiff and defendant. The court held that it was up to the jury to resolve the disagreement.

The burden of demonstrating error on which the judgment should be reversed rests on appellant. (*Danaher v. United States* (C. C. A. 8th), 184 F. 2d 673; see also many cases cited 4 Fed. Digest, p. 832, Appeal and Error, Key 930(1).)

Errors assigned by appellant, but not argued in appellant's brief, are waived. *Kimball Laundry Co. v. United States* (C. C. A. 8th), 166 F. 2d 856, 859, reversed on other grounds, 338 U. S. 1, 69 S. Ct. 1434, 93 L. Ed. 1765; 7 A. L. R. 2d 1280:

> "An unargued assertion of error is no more helpful to an appellate court than is an unsupported allegation of fact to a trial court. The burden of demonstrating error is on an appellant, and errors assigned, but not argued, in his brief, are waived."

The Verdict Was Adequate.

Even though appellant has wholly failed in sustaining his burden of showing error upon this appeal, appellee will show briefly that evidence in the record supports the reasonableness of a jury verdict of not more than $2,000.00. Appellee will not attempt to comb the record for evidence supporting its position. A few examples should suffice.

Following the accident, emergency treatment administered to appellant consisted of an anti-tetanus shot and merthiolate on cuts he had not even noticed until he got to the hospital [Tr. pp. 36-37]. After this emergency treatment, plaintiff went home, where he took a hot bath and went to bed [Tr. pp. 41-45]. When he got up, he drove to the Kaiser Hospital in Fontana, where the doctor gave him two prescriptions [Tr. p. 46].

Appellant's brother drove him to Los Angeles to the Santa Fe Hospital on September 18, four days after the accident [Tr. pp. 54-56]. Referring to the Santa Fe Hospital, appellant testified that they "Took me up, gave me a quick examination, and told me to get into bed and stay there" [Tr. p. 56]. He was in the hospital for thirty days. "I was instructed to get up and walk around . . . *the next day*." (Emphasis added.) Treatment consisted of pills for headaches [Tr. p. 57].

On February 2, 1953, appellant returned to the hospital, "at my own request for a complete physical examination" [Tr. p. 59]. On April 6, 1953, again at his own request, appellant returned to the hospital, where he stayed for eleven days [Tr. p. 60].

On cross-examination, appellant testified that when he first went to the Santa Fe Hospital four days after the accident his complaints were

> "a sore back, stiff, a sore hip. My entire left side was sore. If I moved a little bit it hurt. My chest, when I turned my head, I would get shooting pains upon into the back of my head which tapered off into severe headache that lasted, sometimes, for 45 minutes and sometimes much longer than that, practically a constant headache, but I mean it varied from time to time. And I had cuts and bruises and what have you all over most of my body, various spots. Just where they were I don't remember. I had a bad laceration on my right shin" [Tr. p. 81].

Neither a doctor, appellant's wife, nor appellant put even a bandaid on the bad lacerations or any cut claimed by appellant [Tr. pp. 81-82].

At a formal investigation of the accident held by respondent's superintendent [Tr. p. 82], appellant was

asked just how he was injured in the accident. He replied,

> ". . . my whole left side developed stiffness and soreness, and I told the doctor at the emergency hospital it felt as if I had been sat down hard, although at the time of the accident I was standing up. I was shaken up more than anything, bruises and scratches" [Tr. p. 86].

In April, 1953, Dr. Flamson, his attending physician at the Santa Fe Hospital, asked appellant if he thought he was able to go back to work, and appellant stated he did not believe he was [Tr. p. 96]. Appellant could not recall an attempt by a doctor to give him a release to work before the first part of 1953 [Tr. p. 102]. Appellant's own medical witness, Dr. Parks, testified that appellant had told him that about February, 1953, that a diagnosis of prostatitis had been made at the Santa Fe Hospital [Tr. p. 110]. This, in the doctor's opinion, was not caused by the accident [Tr. p. 137]. The doctor found no evidence of muscle spasm, either in appellant's back [Tr. p. 126] or in his neck [Tr. p. 135].

Dr. Patterson, called by respondent as a witness, examined appellant on October 15, 1952, one month after the accident [Tr. p. 144], at which time the doctor gave the following opinion:

> "This patient is thought to have sustained multiple contusions and abrasions, principally involving the left side of the body. This includes cervical strain and sprain, which has essentially resolved. It is not clear that he sustained any concussion at the time of his injury, and if he did it was apparently mild and has essentially resolved. His headaches are thought essentially subjective in nature. No permanent disability is anticipated as a result of this injury, and

> it would seem that *within a period of 10 days or two weeks* he could return to his work. Physiotheropy might be helpful to the muscles of his neck in the region of the cervical spine" [Tr. pp. 144-145]. (Emphasis supplied.)

If the jury believed this testimony, as they were entitled to do, the verdict was excessive.

Dr. Patterson re-examined appellant on April 9, 1953 [Tr. pp. 148, 151]. He testified:

> " 'It is reported that the patient's urine is full of pus. From a neurological standpoint, there is no evidence of herniated disc or allied condition. The tenderness of the back, essentially in the region of the costovertebral angle, right and left, is probably non-neurogenic in origin. I find no evidence of neurologic disease or disorder at the present time. After genito-urinary studies are completed, and if urinary infection is present and this is cleared up, he can return to his duties as a fireman,' he thought.
>
> Q. But for this urinary infection that he had, you felt he was able to work when you examined him, is that it? A. That is what I thought at that time."

In addition, Exhibit 8, the record of the Santa Fe Hospital, shows much to discount Mr. Veelik's many complaints. In Exhibit 8, following his initial physical examination on September 18, 1952, the examiner noted his impression as follows:

> "Observe—Apparently is only contused moderately severe" [Argument, Tr. p. 180].

A notation under date of September 30, 1952, in Exhibit 8 contains the statement:

> "This man is super cautious" [Argument, Tr. p. 181].

A significant notation made October 16, 1952, in Exhibit 8, reveals:

> " 'Dr. McKeever saw patient and stated that he finds nothing wrong and that in 60 days he could resume work' " [see Argument, Tr. p. 181].

Even more significant is an entry under date of April 17, 1953, initialed by Dr. Richard J. Flamson:

> " 'This man won't accept a release to work. Look at him! A perfect specimen, whose actions are normal—powerfully developed, eats well, etc.' " [see Argument, Tr. p. 182].

It is patent that the jury could believe any one of the doctors or any part of the hospital record, Exhibit 8, and could reasonably come to the conclusion that appellant could have returned to work, especially the type of work he was doing, that of a locomotive fireman on a diesel engine, within a few weeks after the injury and that there was no necessity for his remaining off work for eight months. The jury could reasonably have concluded that appellant's prostatitis kept him off work early in the year 1953, and that the respondent was not to be charged with disability caused by that condition.

Most important of all was the flavor of appellant's testimony before the jury. It is impossible to put into a written brief the impact of appellant's appearance before the jury. Reading his testimony in full would make it reasonably apparent that he was argumentative and overreaching in his myriad claims of injury. The surprise to appellee is that the jury gave him as much as they did.

A very recent case in the California District Court of Appeal, *Sills v. Soto* (April 13, 1954), 124 A. C. A. 603,

608, answers appellant's contentions in the instant case—that the testimony of his own medical witnesses and the period of time he stayed off work entitled him to more damages than the jury gave him:

> "However, the jury was not bound by this testimony [medical testimony that appellant was not feigning his symptoms and that the accident had caused him severe pain and suffering] and was free to exercise its independent judgment in determining the nature, extent and duration of appellant's injuries and the amount of disability resulting therefrom."

Admission of Hearsay Evidence Without Objection Is Not Error.

Appellant's claim of error on page 9 of his brief concerning the statement of Dr. Richard J. Flamson to the effect that "this man won't accept a release to work. Look at him! A perfect specimen, whose actions are normal . . ." is not well taken. This item was read from Plaintiff's Exhibit 8:

> "The Clerk: Are these plaintiffs' exhibits, your Honor?
>
> Mr. Karen: Plaintiffs' exhibits.
>
> The Court: Plaintiffs' exhibits. They are received pursuant to stipulation" [Tr. pp. 79-81].

The mere fact that the statement contained in Exhibit 8 helped to expose the appellant as a malinguerer cannot detract from evidence, the admission of which appellant's own attorney stipulated to. The record shows no objection was made by appellant's counsel to the admission of the record nor does it show any objection to the argument of appellee's counsel.

Hearsay testimony, if no objection is made to its reception, is admissible evidence and will support a finding of fact based thereon. (McBaine, *California Evidence Manual,* Sec. 227, p. 314; *Parsons v. Easton* (1921), 184 Cal. 764, 195 Pac. 419.) Counsel may stipulate that hearsay evidence may be considered. (*Exley v. Exley* (1951), 101 Cal. App. 2d 831, 226 P. 2d 662.)

Conclusion.

Appellant has had the benefit of a jury trial and a unanimous verdict in his favor in the sum of $2,000.00. The trial judge has not seen fit to grant a new trial for inadequate damages. The mere fact this suit was brought under the Federal Employers' Liability Act does not make the appellant entitled to an excessive verdict. There is ample evidence to sustain the jury verdict in this case, even though appellant has done nothing to sustain his burden of showing that it should be reversed. Respondent prays that the judgment be affirmed.

Respectfully submitted,

Robert W. Walker,

J. H. Cummins,

By J. H. Cummins,

Attorneys for Defendant and Appellee.